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CONSIDERATION IN BILATERAL CONTRACTS.

IT seems difficult for writers on the law to achieve unanimity as to the fundamental nature of the consideration necessary to support a promise, and especially is this true where bilateral contracts are concerned. Doubtless the difficulty is partly due to decisions of the courts not wholly consistent with each other, and sometimes partly to a desire to combine a reformation of the law with a statement of it. Some inadequacy in a previous essay of mine,[1] together with the fact that my work as a teacher of the law of contracts compels me to deal with the subject, leads me to give a further expression of my views; though I do so not without reluctance, as I cannot avoid some criticism of the opinions of others with whom I dislike to have a difference.

In the first place, clearness of thought is promoted by using the word consideration as meaning consideration in fact irrespective of its legal sufficiency or validity. Whatever definition may be given to the consideration necessary to support a promise is immaterial for this distinction. Whether it be supposed that detriment to the promisee is a universal definition of what the law requires or whether benefit to the promisor is a permitted alternative, or whether a past indebtedness or a past act done at the promisor's request is likewise enough, the distinction of nomenclature is equally important. If then, it is said that a

[1] 8 HARV. L. REV. 27. Though this essay, as it seems to me, is not guilty of any serious flaw in reasoning, it does not fully state my present views.

promise has no consideration, the meaning will be that in fact no exchange was given for the promise (or no past debt or requested act was in fact the foundation for it). Such will be the situation wherever the promise was intended to be gratuitous, and also wherever the thing in consideration for which the promise was offered was not actually given. On the other hand, if it is said that a promise is not supported by sufficient or good or valid consideration, the meaning is that though the promisor may have asked and received a return for his promise, (or though the promise may have had some basis in fact) the return (or basis) is not such as the law considers sufficient to make the promise enforceable.[2]

When the words "sufficient consideration" are used, no question of illegality or of public policy in any restricted sense is to be understood. It is doubtless generally true that consideration given in fact but illegal, or in violation of public policy, will not support a promise;[3] and it is also true that whatever may be the requirements of sufficient consideration, those requirements, like

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[2] Professor Ballantine has advanced (11 Mich. L. Rev. 423) the suggestion that mutual promises are not really consideration for one another, and that such a statement is elliptical and should be understood as meaning that the performances are consideration for one another. Any mutual promises which contemplate the exchange of performances, since such mutual promises have the elements of a bargain, he regards as constituting a contract. It is not desirable to upset received legal terminology unless some important gain is to be obtained. At best, Professor Ballantine's mode of statement does not improve upon ordinary usage, and is further open to the criticism of being inadequate to explain certain cases. Doubtless it is almost universally true that the performance promised by one party to a bilateral agreement is intended as the consideration for the performance on the other side. A double exchange is contemplated. Promise is the price or exchange for promise and later performance for performance, but this is not always true. If A. promises B. to guarantee a debt of one hundred dollars due B. from X. in return for B.'s promise to A. to guarantee payment of five hundred dollars due A. from Y., the performances are in no sense in exchange for one another, or the consideration of one another, and yet there is a contract. Matters may so turn out that either party alone may be called upon to perform or that both parties or neither party may have to pay. The promises are exchanged, though the performances are not expected to be, and even though the chance falls out that both parties have to pay, their payments are not in exchange for one another. They never proposed to exchange one hundred dollars for five hundred. The facts supposed are suggested by Christie *v.* Borelly, 29 L. J. C. P. N. S. 153 (1860). The same situation arises in all aleatory contracts except where the promises of both parties are conditioned on the same event. In short one promise is the consideration of the other, because it is in fact exchanged for it. Such is the statement constantly made in written bilateral agreements, and such is the truth.

[3] It is not invariably true. See Williston, Sales, § 663.

all rules of law, are in a broad sense dictated by public policy. Nevertheless, the distinction is important between consideration which is merely insufficient, and consideration which is illegal or in violation of some other public policy than that which requires an equivalent satisfactory to the law to be given for a promise in order that the promise shall be binding.[4] In the present essay my only attempt will be to define the sufficiency of consideration as thus distinguished from its legality.

When endeavoring to apply the doctrine of consideration to bilateral contracts a lawyer instinctively seeks to apply the same definition that has been adopted for unilateral contracts. Let it be supposed that this is detriment to the promisee or perhaps, as an alternative, benefit to the promisor. Such detriment or benefit may be sought in bilateral agreements either in the making of a promise in fact, or in the obligation in law created by a promise. Professor Ames took the former alternative;[5] Sir Frederick Pollock,[6] though saying, "It is true that the promise itself, not the obligation thereby created is the consideration," has inserted in the last edition of his treatise a passage which seems inconsistently to state that not the promise in fact, but the obligation of the promise is requested;[7] and at all events is explicit that whether or not the making of the promise as a fact or the obligation of the promise in law is requested, the reason that a promise is sufficient consideration is because it creates a detrimental obligation. Professor Langdell also[8] is explicit only to the same ex-

[4] The importance of the distinction is shown for instance by: "The general principle . . . that if part of a consideration be merely *void*, the contract may be supported by the residue of the consideration, if good *per se;* Bradburne *v.* Bradburne, Cro. Eliz. 149 (1590); Tisdale's Case, Cro. Eliz. 758 (1600); Crisp *v.* Gamel, Cro. Jac. 128 (1607); but if any part of a consideration be *illegal*, it vitiates the whole. Featherston *v.* Hutchinson, Cro. Eliz. 199 (1591); Bridge *v.* Cage, Cro. Jac. 103 (1606); Scott *v.* Gilmore, 3 Taunt. 226 (1810); Woodruff *v.* Hinman, 11 Vt. 592 (1839); 2 Saund. R. (Patteson & Wms. ed.), 136, n. 2." Cobb v. Cowdery, 40 Vt. 25, 28 (1867). So a covenant under seal based on consideration which is illegal or opposed to public policy is as invalid as if the promise were parol.

[5] 12 HARV. L. REV. 29, 32.

[6] Principles of Contract, 8 Eng. ed., 192, 3 Am. ed., 202.

[7] "If it be suggested that the mere utterance of words of promise is trouble enough to be a consideration, the answer is that such is not the nature of the business. Moving of the lips to speak or of the fingers to write is not what the promisor offers or the promisee accepts." Pollock, 8 Eng. ed., 191.

[8] Summary of Contracts, § 81.

tent. He says that the making of a "binding promise" is something of value; and in his argument,[9] applies his test for consideration — detriment to the promisee — to the obligation assumed to be created by the promise.[10]

It seems to me that generally speaking, it is the promise in fact which the offeror requests — not a legal obligation. This is shown, as Professor Ames has said, by the form which such an offer ordinarily takes in fact, and by the form in which a bilateral contract is declared upon, the plaintiff stating merely that in consideration of his promise, the defendant promised. An offeror contemplating the formation of a bilateral contract says nothing of obligations, and asks only a promise in fact. Whether the offeror has bound himself by an obligation and whether he has got one in return is for the law to decide. This is true generally in the formation of contracts.

"A contract has, strictly speaking, nothing to do with the personal, or individual intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." [11]

When a man makes a promise it is immaterial whether he knows that it creates an obligation.[12] So when an offeror asks and receives a promise, the law determines whether or not the promise which he receives shall create a legal obligation on other grounds than the intent of the parties that it shall do so.[13] If it were

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[9] *E. g.*, § 84.

[10] Professor Ashley, who follows Langdell closely, argues that "in the average case" it is the obligation not merely the promise in fact which the offer for a bilateral contract requests. Law of Contracts, § 31.

[11] Hand, J., in Hotchkiss *v.* National City Bank, 200 Fed. Rep. 287, 293 (1911).

[12] One who promises to pay a debt barred by the Statute of Limitations need not know, and frequently does not know that his promise creates a new obligation. A surety who promises to pay a debt though excused by a technical failure to charge him, must know the facts, but need not know their legal effect.

[13] The statement of Savigny which has been popularized for English and American lawyers by Sir Frederick Pollock and others, that an intent to form a legal relation is a requisite for the formation of contracts, cannot be accepted. It may be good Roman law but, if so, it shows the danger of assuming that a sound principle in Roman law may be successfully transplanted. Nowhere is there greater danger in attempting such a transfer than in the law governing the formation of contracts. In a system of law which makes no requirement of consideration, it may well be desirable to limit enforceable promises to those where a legal bond was

true that the request of the offeror were for an obligation rather than for a promise in fact, no fair construction of the offer could permit any other conclusion than that the obligation requested by the offeror was an effective and enforceable obligation, not one unenforceable or voidable at the option of the promisor. Yet, as Professor Ames points out,[14] promises which are voidable or unenforceable on account of fraud, infancy, the Statute of Frauds, or illegality, are sufficient to support counter-promises. If the counter-promisor in such a bargain requested a legal obligation, it can hardly be true that he has received what he asked for. Certainly no offeror who in terms requested an obligation could have had in mind such a feeble bond.

It will not do to urge that a voidable or unenforceable obligation is recognized by the law as within the pale of legal obligations. The inquiry here concerns what the offeror in fact requests and the law cannot, under recognized rules, impose a contract upon him unless he has been given what his request reasonably should be understood to mean. Contracts where one promise is voidable or unenforceable present some difficulty with regard to the law of consideration,[15] but it has not been supposed that they violate fundamental principles of mutual assent.

It is doubtless generally true, though not always, that the reason why the offeror requests a promise in fact is because he expects thereby to acquire an obligation in law, but the reason for his request must not be confused with the request itself.

It must be admitted, however, that it is possible for an offeror to request in his offer the creation of a legal obligation. A. can certainly say to B., — "If you will give me a simple contract right

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contemplated, but in a system of law which does not enforce promises unless a price has been asked and paid for them, there is no necessity for such a limitation and I do not believe it exists. The only proof that it does will be the production of cases holding that though consideration was asked and given for a promise it is, nevertheless, not enforceable because a legal relation was not contemplated. If, however, the parties in effect agree that they will not be bound, this like any other manifested intention will be respected.

Besides the cases referred to in the text, I may suggest the liability of a member of a voluntary association on contracts made on behalf of the association.

"It is of no legal significance that the defendants did not intend to be individually responsible, or that they did not know or believe that as a matter of law they would be." Davison *v.* Holden, 55 Conn. 103, 112, 10 Atl. 515.

[14] 13 HARV. L. REV. 33.

[15] See *infra*, p. 528.

against you for your horse, I will give you a simple contract right against me for one hundred dollars," and it will probably not be doubted that acceptance of such an offer will create a contract, or that the validity of an agreement which provided in terms for the exchange of legal obligations, barring perhaps cases of voidable and of unenforceable promises, will be tested in the same way as if the offeror had requested a promise in fact rather than an obligation in law. So that even if ordinarily it is merely a promise in fact for which the offeror asks, as it is at least possible that an obligation in law may be requested, any difficulties which are involved in that assumption must be met. A technical difficulty, at least, in applying the test of consideration applicable to unilateral contracts exists either on the assumption that a promise in fact is requested or on the assumption that an obligation in law is desired.

If, as I believe is generally the case, it is the promise in fact which the offeror requests, the inquiry naturally follows, why does not a bilateral contract arise whenever a requested promise is given in response to an offer? No satisfactory answer to this question can be made if the definition of consideration in unilateral contracts is of universal application, for whichever of various definitions that have been suggested as appropriate for unilateral contracts, is adopted, the act of making a promise at request will technically satisfy its requirements.

On the other hand, if the offeror were conceived of as asking for a legal obligation, the opposite difficulty is presented in any attempt to apply to bilateral agreements the definition of consideration appropriate to unilateral contracts. The inquiry has been made by Sir Frederick Pollock, "What logical justification is there for holding mutual promises good consideration for each other? None, it is submitted." [16] And this conclusion is justified, if the only principles which we have to go upon are that the offeror requests a legal obligation as the return for his offer, and that in that legal obligation must be found a detriment or benefit necessary under the definition of consideration in unilateral contracts. For these premises involve inevitably a circular line of argument. If a detriment is necessary to support a promise,

[16] 28 Law Quarterly Rev. 101; Pollock on Contracts, 8 Eng. ed., 191.

and therefore to give rise to an obligation binding upon either party, there can be no detriment without an obligation, and, under the rule of consideration which it is sought to apply, there can be no obligation without a detriment. Moreover, the burden is on one who asserts there is a contract to establish it. He will never be able to establish a bilateral contract upon these premises.[17] It is necessary to state as a further proposition that "the act of exchanging the promises makes them enforceable . . . one of the secret paradoxes of the Common Law," [18] and thereupon also to inquire whether exchanging all mutual promises makes them enforceable, or whether this is true of only a certain kind of mutual promises and if so, what is the kind.

It makes very little ultimate difference therefore whether, conceiving that the mutual assent given in the creation of a bilateral contract is an assent to an exchange of promises in fact, we are driven to ask why all mutual promises [19] which do not contravene

[17] It is at this point that the argument of Professor Langdell, in his essay on consideration, in 14 HARV. L. REV. 496, fails. On page 504, he states the method of pleading in contracts, and says that by alleging and proving mutual promises "the plaintiff will, in the absence of any proof by the defendant, establish his case unless the court shall be of opinion that one of the mutual promises, even if supported by a sufficient consideration, is not binding." But the cases of pleading suggested are not in point. It is, of course, true that a defendant who seeks to show that the facts stated in the declaration are not the only essential ones in the case, must allege and prove the additional facts; but when all the facts are before the court, the burden is always on the plaintiff to establish a legal cause of action. The question is not here in regard to disputed facts; all the facts must be taken as known. Under such circumstances the plaintiff has no right to assume that he has a cause of action in order to argue that he has one, nor can the court make any such assumption. When Professor Langdell says the plaintiff will establish his case by proving mutual promises unless apart from consideration one of the promises is not binding, he can be justified in so asserting only if he assumes each promise by one having capacity is necessarily a detrimental obligation to the promisor, or if he assumes the mere making of a promise in fact by such a person is a sufficient detriment. The universality of his statement will not strictly be justified even if he were permitted to assume that any promise which if binding would impose a detriment is sufficient consideration, though I believe from his general argument that the last is the assumption he actually made. But certainly none of these three propositions can be accepted without proof that it represents the law. In fact I believe all of them are at variance with the law and, therefore, unsound.

[18] 30 Law Quarterly Rev. 129, presumably by Sir Frederick Pollock. I see nothing paradoxical about it. All that is necessary is to understand and state that the rules governing consideration in unilateral contracts will not cover the bilateral situation, and a special rule is required.

[19] That is, all mutual promises which would be valid if under seal.

public policy do not make contracts (unless we assert that they all do) as logic would lead us to suppose; or whether conceiving that a bilateral contract is based on assent to an exchange of legal obligations and rebelling from the impossibility of ever logically proving the existence of mutual obligations from the definition of consideration in unilateral contracts, we assert as a further principle that the exchange of the promises makes them enforceable and seek the limits of this apparent principle.

Whichever point of view we take we are turned to the cases to find what kind of mutual promises have been held by the law sufficient consideration for one another; but before doing so, the arguments of Professor Ames that all mutual promises not opposed to public policy create contracts should be answered, since I cannot accept his conclusions.

Though the technical requirements of the definition of consideration in unilateral contracts may be fulfilled by giving any promise in fact, it is obvious that a promise which assures the performance of an act which the law regards as of no value, is merely a technical exchange for a counter-promise, and that if the law is to be practically as well as technically reasonable, the mere making of such promise irrespective of its content, should be insufficient. The only possible answer to this is to maintain, as Professor Ames maintained, that any act whatever, other than a promise, is sufficient consideration for a unilateral contract. If this is true it is reasonable to assert that the promise of any act may likewise be sufficient consideration. But it cannot be admitted that any act or forbearance which is requested as the consideration for a unilateral contract is legally sufficient.

Professor Ames's argument in support of his thesis as to unilateral contracts, is based on an examination of the law governing three classes of cases: namely, those where the consideration consists of,

1. The forbearance to prosecute a groundless claim;

2. The performance of a pre-existing contractual duty to a person other than the promisor;

3. The performance of a pre-existing contractual duty to the promisor himself.

As to the first group of cases, Professor Ames regarded the recent English decisions as deciding that whenever a man thinks he has a good or doubtful cause of action, forbearance of an attempt to en-

force it is sufficient consideration to support a promise. He further believed that this rule would ultimately prevail in the United States. Whether the English law goes so far as to hold that an honest though utterly unreasonable belief in the possible validity of a claim is sufficient to make forbearance by the claimant effectual as consideration, may be open to question, though one decision seems to go to that extreme.[20] The weight of American authority does not yet support such a proposition, though it seems probable that an honest and reasonable belief in the possible validity of a claim would generally be held enough to make the forbearance valid consideration.[21] Whichever of these statements may be taken as desirable or representative of the law, however, there is no inconsistency with the definition that not any act or forbearance whatever but only one which is a legal detriment to the promisee or legal benefit to the promisor is sufficient to support a unilateral contract; for it may well be argued that one who has an honest belief in the validity of his claim has a legal right to attempt its enforcement, and that to forbear to exercise this right is a legal detriment. It seems to have been at one time assumed by the English law that only one who has a valid claim has a right to attempt to enforce his demand. The modern law simply rejects this artificial assumption.

The second group of cases, which includes those where performance of a pre-existing contractual duty to a person other than the promisor is the consideration, affords still less support to the argument. Such cases as sustain the validity of the consideration (a numerical minority) do so because the court holds the promisor in the second contract has received a benefit from the perform-

[20] Ockford *v.* Barelli, 25 L. T. Rep. 504 (1871).

[21] There is almost invariably in the decisions upholding the validity of an agreement of compromise of an invalid claim some language indicating that the claim must have been reasonably made as well as made in good faith. Expressions in two recent cases may be taken as illustrations.

In Jackson *v.* Volkening, 81 N. Y. App. Div. 36, 80 N. Y. Supp. 1102 (1903), the Court says: "It is sufficient if there were any plausible grounds for a *bonâ fide* claim, and it was made in good faith."

In Neubacher *v.* Perry, 103 N. E. 805, 806 (Ind. App., Jan. 9, 1914): "If he was in good faith disputing appellees' claim and was insisting on a construction of the contract which might reasonably be contended for by one not versed in the law, his claim would constitute a sufficient consideration for an accord and satisfaction or compromise."

ance of the promisee, not because anything requested is sufficient consideration. This benefit, it will be noticed, was one to which the promisor was not previously entitled by law. A mild protest must be entered against a method of using these cases, or of using any cases, as if they would support equally well any theory of the law which would involve the same result. Unless the ground on which the court rested the decisions can first be shown to be inadequate for their support, there is no necessity or, indeed, opportunity, to seek for another basis. To do otherwise is to treat the rulings of the court "as the utterings of Balaam's ass, absolutely true, but not presupposing any conscious intelligence in the creatures from whom they proceed." [22] Doubtless it is true that in any large subject there are inharmonious decisions, and that it is not the part of an intelligent lawyer to believe in inconsistent decisions at the same time. And it may also be important to show, as Professor Ames undertakes to show, that a novel line of reasoning will not involve the reversal of many actual decisions; but until some one shows that the reasons given by the court are untenable because of inconsistency with other cases, those reasons must be regarded as controlling.

The third class of decisions which Professor Ames examines consists of cases where performance of a contractual duty to the promisor himself, is the consideration given for the defendant's promise. These are mainly cases where payment of part of a liquidated debt was made in consideration of an agreement to discharge the whole.

That payment of a liquidated debt or part of it will not support any promise by the creditor, is conceded by Professor Ames to be the general rule of law, but he cites early authorities showing that in the sixteenth century the law was probably otherwise. Where there are scores of decisions in the eighteenth and nineteenth centuries, it is submitted that an inquiry as to the law of the sixteenth century is merely of historical interest. That some modern courts have objected to the law on this matter is doubtless true, and it is also true that inconsistently with the general rule several creditors may by simple contract compound their claims against a common debtor and bind themselves effectually to discharge the balance due them; but it is equally clear that the general rule is almost

[22] Professor Gray, 7 HARV. L. REV. 406.

universally settled law, and that it is regarded by the courts not as an exceptional doctrine but as an exemplification of the general principle that an act which is neither legally detrimental to the promisee, nor legally beneficial to the promisor, is insufficient consideration to support a promise. The extent of the changes which have been made by statute or decision in various jurisdictions of the doctrine that payment of part of the debt is insufficient to support an agreement to discharge the whole debt, is not great. In a very few jurisdictions, the law has been changed by decision,[23] and in a few others by statute.[24]

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[23] Clayton *v.* Clark, 74 Miss. 499, 22 So. 189 (1897); Frye *v.* Hubbell, 74 N. H. 358, 68 Atl. 325 (1907); Brown *v.* Kern, 21 Wash. 211, 57 Pac. 798 (1899); Baldwin *v.* Daly, 41 Wash. 416, 417, 83 Pac. 724 (1906).

[24] In North Carolina any agreement to settle the claim by payment in part, is valid whether executed or executory. Jones *v.* Coffey, 109 N. C. 515, 14 S. E. 84 (1891); York *v.* Westall, 143 N. C. 276, 55 S. E. 724 (1906); Pruden *v.* Asheboro & M. R. Co., 121 N. C. 509, 28 S. E. 349 (1897); Ramsey *v.* Browder, 136 N. C. 251, 48 S. E. 651 (1904). The Indian Contract Act, § 63, is equally broad, as is British Columbia Supreme Court Act, sec. 19, sub-sec. 25. In Georgia (Code, § 4329), Maine (Rev. St. c. 84, §59), and Virginia (Code, § 2858), an agreement actually executed by the payment of part of a debt discharges the debt in accordance with the intention of the parties. But an executory agreement to pay part is insufficient consideration. Molyneaux *v.* Collier, 13 Ga. 406 (1853); Stovall *v.* Hairston, 55 Ga. 9 (1875); English *v.* Reid, 55 Ga. 240 (1875); Blalock *v.* Jackson, 94 Ga. 469, 20 S. E. 346 (1894); Burgess *v.* Denison Paper Mfg. Co., 79 Me. 266, 9 Atl. 726 (1887); Fuller *v.* Smith, 107 Me. 161, 77 Atl. 706 (1910). See also Standard Sewing Mach. Co. *v.* Gunter, 102 Va. 568, 46 S. E. 690 (1904). In Alabama (Code, § 3973), California (Civil Code, § 1524), No. Dakota (Rev. Code of 1905, § 5272), Oregon (Hill's Ann. Laws § 765), South Dakota (Rev. Code, § 1180), Tennessee (Code (1896), § 5571), are statutes which give to a written receipt or to a written agreement to accept a part payment in full the same effect which the common law gave to a release under seal. See Stegall *v.* Wright, 143 Ala. 204, 38 So. 844 (1905); Dobinson *v.* McDonald, 92 Cal. 33, 36, 27 Pac. 1098 (1891); Eggland *v.* South, 22 S. Dak. 467, 118 N. W. 719 (1908); Hagen *v.* Townsend, 27 S. D. 457, 131 N. W. 512 (1911). In these states it will be noted a seal has generally been deprived of its common-law efficacy, and the statutes are aimed at supplying the deficiency by giving to a receipt the effect of a release. Part payment of a debt is in these states insufficient consideration to support an agreement to discharge the debt. Scott *v.* Rawls, 159 Ala. 399, 48 So. 710 (1909); Peachy *v.* Witter, 131 Cal. 316, 63 Pac. 468 (1901); Hagen *v.* Townsend, (So. Dak., 1911) 131 N. W. 512; Miller *v.* Fox, 111 Tenn. 336, 76 S. W. 893 (1903), unless accompanied by a written receipt in full. The same effect is given without the aid of statute to such a receipt in a few states, most of which have modified by statute the common-law rules as to sealed instruments. Dreyfus *v.* Roberts, 75 Ark. 354, 87 S. W. 641 (1905); Aborn *v.* Rathbone, 54 Conn. 444, 8 Atl. 677 (1886); Green *v.* Langdon, 28 Mich. 221 (1873); Gray *v.* Barton, 55 N. Y. 68 (1873); Ferry *v.* Stephens, 66 N. Y. 321 (1876); Carpenter *v.* Soule, 88 N. Y. 251 (1882); McKenzie *v.* Harrison, 120 N. Y. 260 24 N. E. 458 (1890).

Such changes even if regarded as commendable, do not seem to warrant an argument against the accuracy of the generally received definition of consideration; they either indicate assent by a small minority of courts to the suggestion of Sir Frederick Pollock that it has not proved fortunate to apply the doctrine of consideration which is rather appropriate to the formation of the contracts, to the discharge of them,[25] or that in a single class of cases an exception to a general rule is desired. In none of the statutes or decisions is any broader result sought than to affect the particular group of cases in question.

The decisions where some performance to which the promisee was bound to the promisor other than the payment of a debt (as for instance completing a building or other piece of work) is given as the consideration for a promise are to the same effect. Almost uniformly they deny the validity of such consideration.[26]

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[25] Pollock, on Contracts, 8 Eng. ed. . . . 3 Am. ed. . . .

[26] Harris *v.* Watson, Peake 72 (1791); Stilk *v.* Myrick, 2 Camp. 317 (1809); Frazer *v.* Hatton, 2 C. B. N. S. 512 (1857); Jackson *v.* Cobbin, 8 M. & W. 790 (1841); Mallalieu *v.* Hodgson, 16 Q. B. 689 (1851); Harris *v.* Carter, 3 E. & B. 559 (1854); Alaska Packers' Assoc. *v.* Domenico, 117 Fed. 99 (1902); Shriner *v.* Craft, 166 Ala. 146 (1910); Main Street Co. *v.* Los Angeles Co., 129 Cal. 301, 61 Pac. 937 (1900); Littlepage *v.* Neale Publishing Co., 34 App. D. C. 257 (1910); Bush *v.* Rawlins, 89 Ga. 117, 14 S. E. 886 (1892); Davis *v.* Morgan, 117 Ga. 504, 43 S. E. 732 (1903); Willingham Sash Co. *v.* Drew, 117 Ga. 850, 45 S. E. 237 (1903). *Cf.* Poland Paper Co. *v.* Foote, 118 Ga. 458, 45 S. E. 374 (1903); Nelson *v.* Pickwick Associated Co., 30 Ill. App. 333 (1889); Goldsborough *v.* Gable, 140 Ill. 269, 29 N. E. 722 (1892); Moran *v.* Peace, 72 Ill. App. 135, 139 (1897); Allen *v.* Rouse, 78 Ill. App. 69 (1898); Mader *v.* Cool, 14 Ind. App. 299, 42 N. E. 945 (1895); Ayres *v.* Chicago, etc. R. Co. 52 Iowa 478, 3 N. W. 522 (1879); McCarty *v.* Hampton Building Assoc., 61 Iowa 287, 16 N. W. 114 (1883); Howard *v.* McNeil, 25 Ky. L. Rep. 1394, 78 S. W. 142 (1904); Wescott *v.* Mitchell, 95 Me. 377, 50 Atl. 21 (1901); Parrot *v.* Mexican C. R. Co. 207 Mass. 184, 93 M. E. 590 (1911); Bell *v.* Oates, 97 Miss. 790, 53 So. 491 (1910); Storck *v.* Mesker, 55 Mo. App. 26 (1893); Wear *v.* Schmelzer, 92 Mo. App. 314 (1902); Easterly *v.* Jackson, 29 Mont. 496, 75 Pac. 357 (1904); Esterly Harvesting Machine Co. *v.* Pringle, 41 Neb. 265, 59 N. W. 804 (1894); Voorhees *v.* Woodhull's Exr's, 33 N. J. L. 494 (1869); Bartlett *v.* Wyman, 14 Johns. (N. Y.) 260 (1817); Vanderbilt *v.* Schreyer, 91 N. Y. 392 (1883); Carpenter *v.* Taylor, 164 N. Y. 171, 58 N. E. 53 (1900); Weed *v.* Spears, 193 N. Y. 289, 86 N. E. 10 (1908); Schneider *v.* Heinsheimer, 55 N. Y. Supp. 630 (1899); Jughardt *v.* Reynolds, 68 N. Y. App. Div. 171, 74 N. Y. Supp. 152 (1902); Moore *v.* Bloomingdale, 126 N. Y. Supp. 125 (1910); Galway *v.* Prignano, 134 N. Y. Supp. 571 (1912); United Merchants' Press *v.* Corn Products Refining Co., 134 N. Y. Supp. 578 (1912); Festerman *v.* Parker, 10 Ired. (N. C.) 474 (1849); Erb *v.* Brown, 69 Pa. 216 (1871); Jones *v.* Risley, 91 Tex. 132, S. W. 1027 (1895); Whitsett *v.* Carney (Tex. Civ. App.), 124 S. W. 443 (1910); Creamery Package Mfg. Co. *v.* Russell, 84 Vt. 80, 78 Atl. 718 (1911); Tolmie *v.* Dean, 1 Wash. Ter. 57 (1858); Magoon *v.* Marks.

In a few jurisdictions only has a contrary view prevailed.[27] This group of cases is therefore flatly opposed to Professor Ames's theory. Even in the case which he supposes,[28] of an agreement in the following terms: "In consideration of the builder's promise to abandon all claim against the employer on the old contract, the employer promises to abandon all claim on the old contract, and to pay the old price plus the additional amount, provided the builder completes the job," the agreement, it is submitted, would create no contract. It must be conceded that the original agreement, if still in part at least unperformed on each side, may be rescinded by mutual consent.[29] And if the original agreement is rescinded, a new agreement made thereafter on any terms to which the parties assent will be binding. Therefore, a rescission followed shortly afterwards by a new agreement in regard to the same subject matter, would create legal obligations according to the terms of the subsequent agreement. It must further be conceded that when a second agreement is made which is intended by the parties as a substitution for the original contract, there is always mutual

11 Hawaii, 764 (1899). See also Hartley *v.* Ponsonby, 7 E. & B. 872 (1857); Eastman *v.* Miller, 113 Ia. 404, 85 N. W. 635 (1901); Proctor *v.* Keith, 12 B. Mon. (Ky.) 252 (1851); Eblin *v.* Miller's Exec'r, 78 Ky. 371 (1880); Endriss *v.* Belle Isle Ice Co., 49 Mich. 279, 13 N. W. 590 (1882); Conover *v.* Stillwell, 34 N. J. L. 54, 57 (1869); Hanks *v.* Barron, 95 Tenn. 275, 32 S. W. 195 (1895). A promise by the contractor to do work beyond what the contract required in consideration of the contract being carried out by the other party is equally invalid. Jughardt *v.* Reynolds, 68 N. Y. App. Div. 171, 74 N. Y. Supp. 152 (1902); Garr *v.* Green, 6 N. Dak. 48, 68 N. W. 318 (1896).

[27] Stoudenmeier *v.* Williamson, 29 Ala. 558 (1857); Bishop *v.* Busse, 69 Ill. 403 (1873); Cooke *v.* Murphy, 70 Ill. 96 (1873). (But see Moran *v.* Peace, 72 Ill. App. 135 (1897)); Coyner *v.* Lynde, 10 Ind. 282 (1858); Holmes *v.* Doane, 9 Cush. (Mass.) 135 (1851); Rollins *v.* Marsh, 128 Mass. 116 (1880); Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122 (1885); Thomas *v.* Barnes, 156 Mass. 581, 584, 31 N. E. 683 (1892); Brigham *v.* Herrick, 173 Mass. 460, 53 N. E. 906 (1899). (But see Parrot *v.* Mexican C. R. Co. 207 Mass. 184, 93 N. E. 590 (1911)); Moore *v.* Detroit Locomotive Works, 14 Mich. 266 (1866); Goebel *v.* Linn, 47 Mich. 489, 11 N. W. 284 (1882); Conkling *v.* Tuttle, 52 Mich. 630, 18 N. W. 391 (1884); Scanlon *v.* Northwood, 147 Mich. 139, 110 N. W. 493 (1907); Osborne *v.* O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209 (1887); Lattimore *v.* Harsen, 14 Johns. (N. Y.) 330 (1817); Stewart *v.* Keteltas, 36 N. Y. 388 (1867). See also Peck *v.* Requa, 13 Gray (Mass.) 407 (1859); Blodgett *v.* Foster, 120 Mich. 392, 79 N. W. 625 (1899); King *v.* Duluth Ry. Co., 61 Minn. 482, 63 N. W. 1105 (1895); Hansen *v.* Gaar, Scott & Co., 63 Minn. 94, 65 N. W. 254 (1895); Gaar *v.* Green, 6 N. Dak. 48, 68 N. W. 318 (1896); Dreifus *v.* Columbian Co., 194 Pa. 475, 45 Atl. 370 (1900); Evans *v.* Oregon, etc. R. Co. 58 Wash. 429 (1910).

[28] 12 HARV. L. REV. 529.

[29] See Wald's Pollock, Contracts, 3 ed., 815.

assent to the rescission of the earlier agreement. But calling an agreement an agreement for rescission does not do away with the necessity of consideration.[30] And when the agreement for rescission is coupled with a further simultaneous agreement that the work provided for in the earlier agreement shall be completed and that the other party shall give more than he originally promised, the total effect of the agreement is that one party promises to do exactly what he had previously bound himself to do, and the other party promises to give an additional compensation therefor. If for a single moment the parties were free from the earlier contract so that each of them could refuse to enter into any bargain whatever relating to the same subject matter, a subsequent agreement on any terms would be good, but to go through the motions of saying in consideration of being released from building a house as hereinbefore agreed, I promise to build just such a house for a higher price, is as ineffectual as if the agreement for greater compensation were put more baldly.

The result, therefore, of the three classes of cases to which Professor Ames appeals, is that in one of the groups (the third), the decisions are necessarily opposed to his theory. In the other two groups the conclusion reached by a large proportion, perhaps the majority of courts, cannot be reconciled with his definition; and those decisions which support the validity of the consideration are rested by the courts on other grounds than those suggested by him; and these other grounds are harmonious with the decisions on the law of consideration generally, and with the definitions customarily given by the courts.

Since, therefore, a due regard for judicial authority prevents one from believing the law to be that any act requested may serve for the consideration of a unilateral contract, it seems unreasonable, even if there were no other difficulty, to hold that the making of any promise would be sufficient to support a counter-promise. Moreover, there are further difficulties precluding assent to such a theory. While it would explain more simply than any other the fact that a voidable or unenforceable promise is sufficient consideration to support a counter-promise, the argument goes too far, for it would also follow that a void promise or an illusory promise

[30] See Wald's Pollock, Contracts, 3 ed., 815.

would be sufficient consideration; but the law, of course, is otherwise. A promise which is void is insufficient consideration,[31] and the cases indicate no inquiry on the part of the court whether the party giving a promise in exchange for the void promise knew or did not know the facts which made void the promise he received.[32]

Illusory promises also, on Professor Ames's theory, would furnish sufficient consideration if requested as the exchange for a counter-promise, and that they are frequently so requested with intent to make a bargain cannot be successfully disputed. A contractor or seller is often so eager to obtain work, or a sale, that he will gladly subject himself to an absolute promise in return for one which leaves performance optional with the other party. This is most commonly illustrated in agreements to buy or sell goods where the quantity is fixed by the wishes of one of the parties. But a promise to buy such a quantity of goods as the buyer may thereafter order,[33] or to take goods "in such quantities as may be desired," [34] is insufficient consideration for a counter-promise.

Finally, the whole reasoning of the cases in regard to consideration is opposed to any theory that mutual promises are universally sufficient consideration for one another. There would be no occasion for all the discussions in the opinions. It would be enough for the court to say, without more, that the parties had made mutual promises.

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[31] Thus the promise of a married woman under disability to contract is not sufficient to support a counter-promise. Smith *v.* Plomer, 15 East. 607, 610 (1812); Shaver *v.* Bear River, etc. Co., 10 Cal. 396 (1858); Warner *v.* Crouch, 14 Allen (Mass.) 163 (1867); Andriot *v.* Lawrence, 33 Barb. (N. Y.) 142 (1860). See also Howe *v.* Wildes, 34 Me. 566 (1852); Warren *v.* Castello, 109 Mo. 338, 19 S. W. 29; (1891); Henrici *v.* Davidson, 149 Pa. 323, 24 Atl. 334 (1822); Williams v. Graves, 7 Tex. Civ. App. 356, 26 S. W. 334 (1894); Shenandoah Co. *v.* Dunlop, 86 Va. 346, 10 S. E. 239 (1889). But see Chamberlin *v.* Robertson, 31 Ia. 408 (1871). And wherever the promise of an infant is void and not merely voidable, it is not sufficient. Johnson *v.* Rockwell, 12 Ind. 76, 81 (1859); Cannon *v.* Alsbury, 1 A. K. Marsh. (Ky.) 76, 77 (1817).

[32] See Meyer *v.* Haworth, 8 A. & E. 467 (1838): If lack of knowledge of these facts made a difference, it might be urged that mistake rather than lack of consideration was the reason for the invalidity of the bargain.

[33] Great Northern Ry. Co. *v.* Witham, L. R. 9 C. P. 16 [1873]; Cold Blast Transportation Co. *v.* Kansas City Bolt Co., 114 Fed. Rep. 77 (1902); T. B. Walker Mfg. Co. *v.* Swift, 200 Fed. 529 (1912).

[34] American Cotton Oil Co. *v.* Kirk, 68 Fed. 791 (1895); Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302 (1895); Rafolovitz *v.* American Tobacco Co., 29 Abb. N. C. 406, 23 N. Y. Supp. 274 (1893); Hoffman *v.* Maffioli, 104 Wis. 630, 80 N. W. 1032 (1899).

Since, then, it cannot be admitted that mutual promises are always sufficient consideration for one another, it becomes necessary to determine in what cases a promise is a sufficient consideration for a counter-promise. Two tests have been suggested either explicitly or implicitly:

1. Sir Frederick Pollock and Professor Langdell apply this test: If the obligation of a promise would be a detriment to the promisor (assuming that the promise creates a binding obligation) the promise is sufficient consideration.

2. "That most accurate of writers, Mr. Stephen Leake," [35] whose work on contracts has long been a standard treatise, says, however, —

"So far as regards the matter of the consideration, as being executed or executory, it may be observed that whatever matter, if executed, is sufficient to form a good executed consideration; if promised, is sufficient to form a good executory consideration: so that the distinction of executed and executory consideration has no bearing upon the question of the sufficiency of any particular matter to form a consideration." [36]

I believe that the second of the views thus stated is that sanctioned by the law, and, moreover, intrinsically is the more reasonable of the two. When bilateral contracts were first recognized no elaborate discussion was had of the requirements of a promise in order that it might be sufficient consideration for another promise. It was simply decided that a promise was sufficient consideration for another promise. It was not long, however, before some definition was made of the character of a promise which would be sufficient consideration for another promise. Lord Holt stated that "where the doing a thing will be a good consideration, a promise to do that thing will be so too." [37] In subsequent cases there has

[35] 2 Law Quarterly Rev. 113.

[36] Leake on Contracts, 1 ed., page 314; 2 ed., pp. 612, 613. In the third edition the author states in his preface that finding the book "has been more used in the practice of the profession than in the study of the law, for which as originally prepared, he thought it might perhaps be useful . . . he has endeavored to revise the work strictly for the service of the profession with the single aim of presenting a convenient digest of the leading principles of the law of contracts as derived from judicial exposition." The author, with this aim in view, considerably diminished the size of the book, and the passage, above quoted, was omitted.

[37] Thorp *v.* Thorp, 13 Mod. 455 (1701).

been very little attempt at exact definition, but the notorious failure of the courts to mark the distinction between unilateral and bilateral contracts until recently (of which the failure to provide any brief name to distinguish the two is an indication), shows that the court must have applied to bilateral contracts a test which would be just as applicable had the contract been unilateral, and an examination of the cases shows that even where it plainly appears that the contract was bilateral, the court in discussing the sufficiency of consideration, considered the character of the things promised.[38] But occasionally a court has made a statement in clear terms. Lord Blackburn, than whom no better modern authority could be cited, stated the principle as follows:

"The general rule is, that an executory agreement by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do is 'either for the benefit of the defendant or to the trouble or prejudice of the plaintiff.'" [39]

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[38] In Thomas *v.* Thomas, 2 Q. B. 851 [1842], there was plainly set out a written agreement containing mutual promises. The court in considering the sufficiency of consideration examined the nature of the things promised. Thus Lord Denman said: "Then the obligation to repair is one which might impose charges heavier than the value of the life estate." So Patteson, J., in speaking of the sufficiency of the plaintiff's promise, expressly considers the sufficiency of the things promised by her; namely, payment of rent and making of repairs. Such statements as that made in Benson *v.* Phipps, 87 Tex. 578, 29 S. W. 1061 (1895), "a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract," necessarily involve the assumption that no promise is sufficient consideration unless the thing promised would be. In Morrow *v.* Southern Express Co., 101 Ga. 810, 28 S. E. 998 (1897), and Simpson *v.* Sanders, 130 Ga. 265, 268, 60 S. E. 541 (1908), the court said: "If one assumes under such an agreement [by mutual promises] to do a special act beneficial to another, and that other under the terms of the contract is under no obligation to perform an act of corresponding advantage to the former, the agreement is without such consideration as will support the promise of the party assuming to perform." In Schuler *v.* Myton, 48 Kans. 282, 29 Pac. 163 (1892); the court said: "It is well settled that an agreement to do or the doing of which one is already bound to do does not constitute a consideration for a new promise." Similarly in Cobb *v.* Cowdery, 40 Vt. 25, 28 (1867), the court said: "And so it would be in any other case where the only consideration for the promise of one party was the promise of the other party to do, or his actual doing, something which he was previously bound in law to do." See also Robinson *v.* Jewett, 116 N. Y. 40, 22 N. E. 224 (1889), where in dealing with a written contract containing mutual promises and signed by both parties the court (at page 53) discusses the insufficiency of certain acts promised to serve as consideration.

[39] Bolton *v.* Madden, L. R. 9 Q. B. 55, 56 [1873].

The Minnesota court has made an equally plain statement:

"The case is, then, one of a promise on the part of the plaintiff to do something of advantage in law to the defendant, and on the part of the defendant to do something of advantage in law to the plaintiff — a case of mutual promises, one of which is the consideration of the other. The agreement was valid and binding upon both parties." [40]

The elaborate definition given in Currie *v.* Misa,[41]

"A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

contains in substance the same principle.[42] The definitions of modern American text writers often state clearly the same test.[43]

Until it can be shown that the statements thus referred to are opposed to actual decisions, or at least that there are plainly inconsistent judicial statements in the books, I may be excused for believing that my quotations represent the law. I have not found judicial statements inconsistent with them. So far as decisions go, the cases are few where an actual difference of result would be produced, according as one accepts Sir Frederick Pollock's definition, or Mr. Leake's. The most sharply defined difference is in regard to the third party cases, which have been more discussed than any others relating to the law of consideration.

Under the definition of Sir Frederick Pollock and Professor Langdell a bilateral agreement between B. and C. by which B. promises to do something which he was previously legally bound to do by contract with A., is a valid contract, since assuming B.'s promise to C. to be binding, it imposes a new detriment on B.,

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[40] Schweider *v.* Lang, 29 Minn. 254, 13 N. W. 33 (1882).

[41] L. R. 10 Exch. 153 [1875].

[42] To have stated the matter exactly, the words "or undertaken" which are contained in the last clause of the definition, should also have been included in the first clause.

[43] "Such promise is as lawful a consideration as the thing promised would have been." Page, Contracts, § 296. "A promise given in consideration and because of the fact that another promise is given, is binding provided the promise given is for the performance of some act which if executed would be a sufficient consideration for an obligatory unilateral contract." Elliott, Contracts, § 231. "A promise to do an act, or forbearance from doing an act, is just as valuable consideration for a promise as the act or forbearance would be." 9 Cyc. 323.

namely, liability to a new person in case of non-performance of the promised act; though both Sir Frederick Pollock and Professor Langdell contend that had B. performed the act in question at C.'s request instead of promising to perform it, the previous obligation to A. would have prevented the performance from being a detriment in law to B., and no new contract would be formed.

Under Mr. Leake's definition, no distinction is possible between cases where the second agreement is bilateral and where it is unilateral. If the performance is sufficient consideration for a contract, the promise of performance is likewise sufficient. If actual performance is insufficient, so is a promise of performance. Now how are the authorities?

In England it has been settled that such agreements are valid contracts. In the actual cases the contracts in suit seem to have been unilateral; but none of the commentators, nor the courts themselves suggest any reason for supposing bilateral agreements would not equally have been upheld.[44]

In the United States the weight of authority is opposed to the validity of such agreements, whether unilateral or bilateral.[45]

[44] I have indicated in this and in the following notes, so far as possible, whether the second contract, that on which the plaintiff was suing, appears to have been unilateral or bilateral. Shadwell *v.* Shadwell, 30 L. J. C. P. N. S. 145 (1860), (unilateral); Scotson *v.* Pegg, 6 H. & N. 295 (1861), (probably unilateral); Chichester *v.* Cobb, 14 L. T. Rep. N. S. 433 (1866); Skeete *v.* Silberberg, 11 T. L. Rep. 491 (1895), (unilateral).

[45] Johnson's Adm. *v.* Seller's Adm., 33 Ala. 265 (1858), (bilateral). *Cf.* Humes *v.* Decatur L. I. & F. Co., 98 Ala. 461, 473, 13 So. 368 (1892); Ellison *v.* Water Co., 12 Cal. 542, 553 (1859), (bilateral); Havana Press Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. 873 (1893), (promise to perform existing obligation to third party no valid consideration for license to use patent); Peelman *v.* Peelman, 4 Ind. 612 (1853), (unilateral); Ford *v.* Garner, 15 Ind. 298 (1860), (bilateral); Reynolds *v.* Nugent, 25 Ind. 328 (1865), (unilateral); Ritenour *v.* Mathews, 42 Ind. 7 (1873), (unilateral. In this case promise was by surety to principal debtor in consideration of being relieved from liability); Harris v. Cassady, 107 Ind. 158, 8 N. E. 29 (1886), (bilateral); Brownlee *v.* Lowe, 117 Ind. 420, 422, 20 N. E. 301 (1888), (general *dictum*); Barringer *v.* Ryder, 119 Ia. 121, 93 N. W. 56 (1903), (promise to perform obligation to a third person held insufficient consideration for a conveyance); Holloway's Assignee *v.* Rudy, 22 Ky. L. Rep. 1406, 60 S. W. 650 (1901), (unilateral); Ford *v.* Crenshaw, 1 Litt. (Ky.) 68 (1822), (in statement of facts stated as unilateral, but in discussion stated as mutual promises); Schuler *v.* Myton, 48 Kans. 282, 29 Pac. 163 (1892), (unilateral, but *dictum* that a bilateral contract also would be invalid); Putnam *v.* Woodbury, 68 Me. 58 (1878), (uncertain); Northwestern Nat. Bank *v.* Great Falls Opera House Co., 23 Mont. 1, 11, 57 Pac. 440 (1899), (unilateral. Previous obligation was as a fiduciary for a third person); Gordon *v.* Gordon, 56 N. H. 170 (1875),

Some American cases, however, follow the English decisions and hold the second agreement valid, and in these cases too, no distinction is taken between unilateral and bilateral contracts.[46] In one decision only[47] has such a distinction been attempted; and in this case the distinction was taken in a dictum based on a passage from Sir Frederick Pollock's work to which the court refers.

The ground upon which the English cases are rested and that on which such American decisions as follow them are also in the main rested, is that the performance to which the plaintiff had been bound to a third person was beneficial to the plaintiff, and the argument of the courts by what is not said as well as by what is said, seems to make plain that these courts regard either the actual doing, or the promise to do such a beneficial act, a sufficient consideration.[48] I confess it is a matter of some surprise to me that the

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(probably bilateral); Vanderbilt *v.* Schreyer, 91 N. Y. 392 (1883), (probably unilateral); Seybolt *v.* New York, etc. R. Co., 95 N. Y. 562, 47 Am. Rep. 75 (1884), (bilateral); Robinson *v.* Jewett, 116 N. Y. 40, 22 N. E. 224 (1889), (bilateral); Arend *v.* Smith, 151 N. Y. 502, 45 N. E. 872 (1897), (unilateral); Alley *v.* Turck, 8 N. Y. App. Div. 50, 52, 40 N. Y. Supp. 433 (1896), (unilateral); Petze *v.* Leary, 117 N. Y. App. Div. 829, 102 N. Y. Supp. 960 (1907), (unilateral); Sherwin *v.* Brigham, 39 Ohio St. 137 (1883), (bilateral); Hanks *v.* Barron, 95 Tenn. 275, 32 S. W. 195 (1895), (unilateral); Kenigsberger *v.* Wingate, 31 Tex. 42 (1868), (unilateral); Cobb *v.* Cowdery, 40 Vt. 25, 28, (1867), (*dictum* as to both unilateral and bilateral); Davenport *v.* First Congregational Soc., 33 Wis. 387 (1873), (unilateral).

[46] Humes *v.* Decatur Land Improvement Co., 98 Ala. 461, 473, 13 So. 368 (1892) (bilateral. Recovery allowable only where defendant will be benefited by plaintiff's performance); Hirsch *v.* Chicago Carpet Co., 82 Ill. App. 234 (1899), (unilateral); Donnelly *v.* Newbold, 94 Md. 220, 50 Atl. 513 (1901), (unilateral); Abbott *v.* Doane, 163 Mass. 433, 40 N. E. 197 (1895), (probably bilateral); Bradley *v.* Glenmary Co., 64 N. J. Eq. 77, 53 Atl. 49 (1902), (unilateral); Avondale Marble Co. *v.* Wiggins, 12 Pa. Sup. Ct. 577 (1900), (bilateral). See also Day *v.* Gardner, 42 N. J. Eq. 199, 203, 7 Atl. 365 (1886).

[47] Merrick *v.* Giddings, 1 Mackey (D. C.) 394, 410 (1882).

[48] In Shadwell *v.* Shadwell, 30 L. J. C. P. N. S. 145, 148, 149 (1860), Erle, J., who delivered the opinion of the majority of the court after having first suggested that the plaintiff may have incurred a detriment at his uncle's request in performing his engagement to marry, by changing his position relying on the uncle's promise, added: "Secondly, do these facts show a benefit derived from the plaintiff to the uncle at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the *status* of the nephew which the uncle declares. The marriage primarily affects the parties thereto; but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him."

Byles, J., rested his dissent mainly on the well founded objection that the plaintiff's marriage was not requested by his uncle as the consideration for his promise,

commentators on these cases have not generally thought it worth while to consider the actual reasons inducing the courts which have

but also said: "Now, the testator in the case before the court derived, so far as appears, no personal benefit from the marriage."

In Scotson *v.* Pegg, 6 H. & N. 295, 299, 300 (1861), Martin, B., said: [The plea] "is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. . . . The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiff had previously contracted with third parties to deliver their order."

Wilde, B., the only other judge delivering an opinion, said, ibid. 300: "Here the defendant who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him."

In Humes *v.* Decatur Land Imp. Co., 98 Ala. 461, 473, 13 So. 368 (1892), the court said: "In the case of Johnson, Admr. *v.* Sellers, 33 Ala. 265 (1858), it is said, 'a promise by defendant to plaintiff, made to induce the latter to comply with an existing contract between him and other persons is without consideration.' We are not disposed to depart from the rule as here stated, but we are not willing to extend it so that if the party making the second contract is directly interested in the result, and is to be benefited, he cannot employ the same party for the protection of his own interest."

In Hirsch *v.* Chicago Carpet Co., 82 Ill. App. 234, 237 (1899), the court gave as its reasons for upholding a promise given to induce performance by the plaintiff of a contract with the Tivoli company to deliver goods to it, that they "were not outside parties having no interest in the matter. They were the principal officers of the Tivoli company."

In Donnelly *v.* Newbold, 94 Md. 220, 222, 50 Atl. 513 (1901), the same argument is used. "The fact which appears on the face of the guaranty that the appellee was interested in the land which was to be improved by the use of the bricks constituted a consideration sufficient to support the guaranty."

In Abbott *v.* Doane, 163 Mass. 433, 40 N. E. 197 (1895), the court said: "If A. has refused or hesitated to perform an agreement with B. and is requested to do so by C. who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise."

In Day *v.* Gardner, 42 N. J. Eq. 199, 203, 7 Atl. 365 (1886) the court said: "A substantial benefit accrued to her from the payment of the taxes . . . [There was no personal obligation on the promisor to pay the taxes] but if a personal liability had existed, the duty which such liability would have imposed would have been a duty to the government which was entitled to the taxes, and not to the mortgagee, and I am not prepared to say that, in such a condition of affairs, the collateral benefit resulting to a mortgagee from the payment of taxes, which were entitled to priority in payment over his mortgage, would not constitute a perfectly valid consideration for such a contract as that on which the defense in this case rests."

In Bradley *v.* Glenmary Co., 64 N. J. Eq. 77, 83, 53 Atl. 49 (1902), the same reason is given. "The reduction of the amount due on the first mortgage by the payment on the principal of $2,000, with all arrears of interest, thereby reducing it to $7,000, was a direct benefit to the complainant."

upheld such agreements to decide as they have. I conceive the discussion to be well worth while whether benefit to the promisor is not sufficient consideration. That, however, is another story, and I will only say here that I have changed my mind upon this point since my essay on this subject of some years ago,[49] and that now on the ground of legal benefit to the promisor I support the English cases and such American decisions as follow them in upholding the second agreement, whether unilateral or bilateral. My point in alluding to the matter in this connection is to make clear that the cases which uphold the validity of the second agreement apply Mr. Leake's test, as likewise do the contrary decisions. The difference between the two being that the former regard legal benefit given or promised to the promisor as sufficient consideration, the latter do not.

Another class of cases which are inconsistent with the theory which I have attributed to Sir Frederick Pollock and Professor Langdell, consists of bilateral agreements, in which one promise is a promise to pay a debt. It is well settled that such agreements are not binding.[50] These cases are decided on the ground that the performance of the promise to pay the debt involves no legal detriment to one party or legal benefit to the other; and yet the promise if binding would involve a detriment since it extends the period of the Statute of Limitations.

Finally, I regard Mr. Leake's test as the better of the two in question, because, as I have already said, it seems to me intrinsically unreasonable that a promise of an act should ever be regarded as greater value by the law than actual performance of that very act. As the matter has been well put,[51] the contrary view in-

[49] 8 HARV. L. REV. 27.

[50] Lynn *v.* Bruce, 2 H. Bl. 317 (1794); Ford *v.* Garner, 15 Ind. 298 (1860); Reynolds *v.* Nugent, 25 Ind. 328, 329, 330 (1865); Crowder *v.* Reed, 80 Ind. 1, 13 (1881); Harris *v.* Cassady, 107 Ind. 158, 168, 8 N. E. 29 (1886); Cuthbertson *v.* First Nat. Bank, 138 N. W. 1090 (Iowa, 1912); Schuler *v.* Myton, 48 Kans. 282, 288, 29 Pac. 163 (1892); Eblin *v.* Miller, 78 Ky. 371 (1880); Jenness *v.* Lane, 26 Me. 475 (1847); Vanderbilt *v.* Schreyer, 91 N. Y. 392, 401 (1883); Seybolt *v.* New York, L. E. & W. R. Co., 95 N. Y. 562, 575 (1884); Bryan *v.* Foy, 69 N. C. 45 (1873); Citizens' Nat. Bank *v.* Marks, 34 Pa. Sup. Ct. 310, 314 (1907); Rose *v.* Daniels, 8 R. I. 381 (1866). See also Jones *v.* Waite, 5 Bing. (N. C.) 341, 351, 356, 358–359 (1839); Jones *v.* Coffey, 109 N. C. 515, 14 S. E. 84 (1891); Pruden *v.* Asheboro & M. R. Co., 121 N. C. 509, 28 S. E. 349 (1897); Ramsey *v.* Browder, 136 N. C. 251, 48 S. E. 651 (1904).

[51] Professor Ballantine, 11 Mich. L. Rev. 427.

volves the assertion "that a bird in the hand is worth less than [the same] bird in the bush."

Whatever may be the character of the thing promised, a promise will be of no value unless it is binding; and the rule, though general, that mutual promises *are* binding which promise some act or forbearance, which would itself be sufficient consideration, is not universal. There are other reasons besides lack of consideration which make promises void — notably lack of capacity. The qualification which thus must be made to the definition of consideration in bilateral contracts is as essential to Professor Langdell's definition as to Leake's. Both definitions propose a general test to determine when mutual promises are binding; and neither test can be applied successfully where the promisor lacks capacity, or where for any other reason than lack of consideration the promise is void.[52]

For the same reason a promise in a bilateral agreement which is void for lack of a proper counter-promise to serve as consideration, is itself insufficient consideration, since it is not binding, and is therefore valueless. This is an obvious consequence of the requirement of consideration in bilateral contracts. The principle is ordinarily stated in the axiom that in a bilateral agreement both promises must be binding or neither is binding.[53] In recent years in a few States this application of the law of consideration has sometimes been referred to as if based on some special requirement of "mutuality." This terminology is unfortunate, since it leads to confusion. If anything more or different is meant by saying that mutuality is necessary for the formation of a contract, than by saying sufficient consideration is necessary for a contract, the statement must be deemed erroneous. At best, therefore, the use of the word mutuality in this connection is superfluous; at the worst, it is misleading. It has occasionally led courts to suppose that an

[52] "A promise is a good consideration for a promise. But no promise constitutes a consideration which is not obligatory upon the party promising," per Sanborn, J. Coldblast Transportation Co. *v.* Kansas City Bolt & Nut Co., 114 Fed. 77 (1902).

[53] "Either all is a *nudum pactum* or else the one promise is as good as the other." Harrison *v.* Cage, 5 Mod. 4118 (1699), per Holt, C. J. "The promises must be concurrent and obligatory upon each at the same time to render either binding." Morrow *v.* Southern Express Co., 101 Ga. 810, 28 S. E. 998 (1897); Simpson *v.* Sanders, 130 Ga. 265, 268, 60 S. E. 541 (1908); Reding *v.* Anderson, 72 Ia. 498 (1887); El Paso, etc. R. Co. *v.* Eichel (Tex. Civ. App.), 130 S. W. 922 (1910).

option given for consideration is not binding because the party having the option makes no agreement to perform.[54] This, of course, is not in accordance with the weight of authority or of reason.[55] Moreover, mutuality has a distinct meaning in courts of equity. A contract between an infant and an adult lacks mutuality in this sense and therefore equity will not give specific performance at suit of the infant.[56] Yet, such an agreement constitutes a contract.

It is not essential in order that a promise shall be sufficient consideration that its performance will certainly prove detrimental to the promisor or beneficial to the promisee. A conditional promise is sufficient consideration. The performance of such a promise does not necessarily involve either detriment or benefit, since the condition upon which any action of the promisor is to take place may not happen. But the possibility that the condition may happen, involves a chance of detriment which is sufficient to make the promise valid consideration. If, however, the condition in a promise relates to a matter which has already happened so that if the truth were known to the parties it would be apparent that the promisor really bound himself for nothing, it may be urged that the promise is insufficient consideration. For instance, the buyer and seller of a tract of land supposed to contain a certain number of acres mutually agree that if the amount of land in the tract is less than supposed, a deduction shall be made in the price for each acre of deficiency; while if the amount of land in the tract exceeds what had been understood, a corresponding increase for each added acre shall be made. On a survey being made the tract proves larger than had been supposed. In actual fact, therefore, the seller in promising to pay for a possible deficiency promises nothing, since there was no deficiency, and could be none. Nevertheless, on these facts it has been held that the buyer's promise to pay for the excess was supported by sufficient consideration.[57] So where several heirs agreed after a relative's death, but before the contents of his will

[54] See Crane *v.* Crane, 105 Fed. 869 (C. C. A.) (1901); Huggins *v.* Southeastern Lime and Cement Co., 121 Ga. 311, 48 S. E. 933 (1904). See also Long Syrup Refining Co. *v.* Corn Products Refining Co., 193 Fed. 929 (C. C. A.) (1912).

[55] Vickrey *v.* Maier, 164 Cal. 384, 129 Pac. 273 (1912); Burgess Fibre Co. *v.* Broomfield, 180 Mass. 283, 62 N. E. 367 (1902); 40 Am. L. Reg. 327.

[56] Flight *v.* Bolland, 4 Russ. 298 (1828); Fry on Specific Performance, § 460; Professor Lewis in 40 Aur. L. Reg. 270, 319, 383, 447, 507, 559.

[57] Seward *v.* Mitchell, 1 Coldw. (Tenn.) 87 (1860).

were known, that whatever the terms of the will they would divide the estate evenly, the agreement was held binding, although in actual fact those who would receive under the will less than a ratable share were promising nothing in return for the promises of those who under the will would take more than a ratable share to surrender some portion to the others.[58] So a wager on an unknown past event aside from the defence of illegality (which would now be sustained) is a valid contract;[59] and other decisions involving the same principle might be added.[60] Professor Langdell regards these decisions as inexplicable on principle and only to be accounted for by the maxim *communis error facit jus;* but when a decision is founded on common sense it seems better to seek an underlying reason than to ascribe the result to common error, and I think it evident that the law looks at the matter not from the standpoint of universal intelligence but from the standpoint of the parties; and as the law is made for man, not man for the law, this is the only proper attitude. From the standpoint of the parties in the cases referred to above, the risk is as real where the contingency has already happened, but is unknown, as is the case where the contingency has not yet happened.[61] This is not saying that anything is detrimental which the parties think detrimental, but only that where on the facts known at the time of the bargain any reasonable person would think performance of the promise might require an act or forbearance, which the law (not the parties) regards as detrimental to the promisor or beneficial to the promisee, the promise is sufficient consideration.

The result of this argument is that no briefer definition of sufficient consideration in a bilateral contract can be given than this: Mutual promises each of which assures some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any

[58] Supreme Assembly *v.* Campbell, 17 R. I. 402, 22 Atl. 307 (1891).

[59] Sheppard, Actions, 2 ed. 178; March *v.* Pigot, 5 Burrows (Eng.) 2802 (1771).

[60] Barnum *v.* Barnum, 8 Conn. 469 (1831); Rothrock *v.* Perkinson, 61 Ind. 39 (1878); Howe *v.* O'Mally, 1 Murphy (N. C.) 187 (1809); Kennedy's Ex. *v.* Ware, 1 Pa. St. 445 (1845). See also Beckley *v.* Newland, 2 P. Wms. 182 (1723); McElvain *v.* Mudd, 44 Ala. 48 (1870); Curry *v.* Davis, 44 Ala. 281 (1870); Pool *v.* Docker, 92 Ill. 501 (1879). But compare Walker *v.* Walker, Holt 328, 5 Mod. 13 (1695); Harding *v.* Walker, Hempst. (U. S.) 53 (1828); Smith *v.* Knight, 88 Ia. 257, 55 N. W. 189 (1893).

[61] Holmes, Common Law, 304.

rule of law other than that relating to consideration, are sufficient consideration for one another.

It remains only to consider two special cases which have been thought difficult to reconcile with the theory of consideration which I have advanced. As has been said, it is undoubtedly law that a voidable or unenforceable promise is sufficient consideration to support a counter-promise. One may state the result of the cases on this question clearly. A defense given by law to a promisor enabling him at his option to avoid performance, will not prevent the promise from being sufficient consideration.

I believe that this rule, though wise, must be regarded as an exception to the principles of consideration.

The promise of an infant, an insane person, or one whose promise is for any reason performable only at his option, is not a thing of such value, whatever may be the nature of the thing promised, that the law would ordinarily regard such a promise as sufficient consideration. This may be readily seen by supposing that the terms of a voidable obligation such as the law imposes on promisors of the classes just enumerated, be put in words and then made as a promise by an adult under no disability. It will be obvious that the promise is insufficient to support a counter-promise. Whether the infant's promise be translated as meaning — I promise to perform if I choose, or I promise to perform if I conclude to ratify, or I promise to perform unless I choose to avoid my agreement, — it is clear that the promise is illusory, since its performance is by its very terms at the option of the promisor, and he can exercise this option without incurring a detriment or giving a benefit. The same line of argument is applicable to any voidable or unenforceable promise. That a promise which in terms reservet the option of performance to the promisor is insufficient suppors of counter-promise is well settled.[62] And the promise is no more effectual because the condition contained in it is in the form of a condition subsequent rather than a condition precedent. An agreement which one party reserves the right to cancel at his pleasure, cannot create a contract. These cases where promises

[62] Roberts *v.* Smith, 4 H. & N. 315 (1859); Montreal Gas Co. *v.* Vasey, [1900] A. C. 595; Oakland Motor Car Co. *v.* Indiana Automobile Co., 201 Fed. 499 (1912); Velie Motor Car Co. *v.* Kopmeier Motor Co., 194 Fed. 324; Vogel *v.* Pekoc, 157 Ill. 339, 42 N. E. 386 (1895); Lydick *v.* Baltimore & Ohio R. Co., 17 W. Va. 427 (1880).

are held sufficient consideration though the law gives the promisor an unqualified right to avoid them, can be satisfactorily explained on no theory of consideration except that advanced by Professor Ames — that any promise asked for if in fact given is sufficient consideration. And though Professor Ames's theory escapes this difficulty, it is not the theory upon which these cases were actually decided, and, as has been seen, involves such other difficulties when compared with existing law that it cannot be accepted.

Cases where a promisor warrants the truth of existing facts have also been put in opposition to the argument that a promise must in order to furnish sufficient consideration be a promise of something which would if actually given be sufficient consideration for a unilateral contract. It is said:

"I agree that a horse which I sell shall be sound, or shall win a race; or that a man shall pay his debts; or that a ship shall come safe to port: in all these cases my promise is a valid consideration for a counter-promise. Yet the soundness or speed of the horse, the solvency of the third party, or the safety of the ship could not be a valid consideration for a promise made to me." [63]

Here, however, there is no inconsistency or exception. A warranty or promise of the truth of an existing fact can only be understood as meaning a promise to be responsible in damages if the fact asserted is not true. The warranty of the existence of an event in the future when construed means either a promise to bring about the existence of the event or a promise to pay damages if the event does not happen, and either the present causation of the fact or the present payment of damages [64] for the unsoundness or lack of speed of the horse, the insolvency of the third party, or the loss of the ship would be as sufficient consideration as the promise of warranty.

Samuel Williston.

HARVARD LAW SCHOOL.

[63] Professor Beale, 17 HARV. L. REV. 82.

[64] See Holmes, Common Law, 299. The distinguished author's extension of this construction to all contracts seems erroneous. It is merely a question of fact whether a promisor agrees to "take the risk" of an event happening (that is to pay for the consequences if it does not happen) or agrees to cause it to happen.